This is allowed under section 51(1) SCJA which provides :

"51(1) Except in the cases mentioned in subsection (3), no appeal shall operate as a stay of execution, but the trial court or the Court of Criminal Appeal may stay execution on any judgment, order, conviction or sentence pending appeal on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in such judgment, order, conviction or sentence as to the court may seem reasonable."

When an accused has been tried and convicted by the High Court and wishes to apply for bail pending appeal, he should in the first instance apply to the trial court. If the trial court refuses bail, he may apply to the Court of Criminal Appeal. He may of course choose to make a second application to the trial court instead of applying to the Court of Criminal Appeal. We again emphasise here the principle to be applied in hearing a second or any subsequent application, namely, that there should be a material change of circumstances or that new facts have since come to light, before such an application will be granted. The applicant and his counsel should bear this in mind before contemplating such an application.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Leo Fernando; Vijay & Co.*

DIMPEX GEMS (SINGAPORE) PTE. LTD. v. YUSOOF DIAMONDS PTE. LTD.

[A.C.J. (Thean J.) June 26, 1987]
[Singapore – Suit No. 4353 of 1986]

Contract – Illegality – Claim for sums owing – Defence of illegality – Mere knowledge of illegality on plaintiffs' part – No defence to plaintiffs' claim – Order granting unconditional leave to defend by Assistant Registrar varied on appeal.

Civil Procedure – Order 14 application – Defence of illegality of contract – Unconditional leave to defend – Order varied on appeal.

The plaintiffs claimed for $340,818.67 against the defendants for the price of diamonds and gems sold and delivered by the plaintiffs to the defendants. The defendants admitted the claim but contended that the contracts for the sale of diamonds and gems to them were tainted with illegality. The defendants claimed that the diamonds and gems sold to the defendants were meant for sale in Peninsular Malaysia and that they were to be taken there without any declaration and payment of customs duty due to the Malaysian authority. That was the only defence raised and it was submitted on behalf of the defendants that that was a triable issue.

The learned Assistant Registrar, who heard the application, gave unconditional leave to the defendants to defend the action and against that decision, the appeal was brought.

Held: (1) the decision of the learned Assistant Registrar must be varied and leave be given to the defendants to defend the action on condition that the defendants furnish a bank guarantee for the sum of $340,818.67 within 21 days from the date of judgment, in default of which the plaintiffs would be at liberty to enter final judgment against the defendants for the sum claimed with interest and costs;

(2) mere knowledge on the part of the plaintiffs that the diamonds and gems sold to the defendants would be exported illegally by the defendants to Malaysia does not constitute a defence to the claim by the plaintiffs.

Cases referred to:

(1) *Fielding & Platt Ltd.* v. *Selim Najjar* [1969] 1 W.L.R. 357.
(2) *Foster* v. *Driscoll* [1929] 1 K.B. 470, 518.

APPEAL FROM REGISTRAR'S DECISION.

M. Karthigesu (*Alan Wong* with him) for the plaintiffs/appellants.

Kalamohan s/o R. Pillai for the defendants/respondents.

Cur. Adv. Vult.

Thean J.. This was an appeal against the decision of the Assistant Registrar given on March 9, 1987 in which, on an application under Order 14 of the Rules of Supreme Court by the plaintiffs for judgment, he gave the defendants unconditional leave to defend the action.

The plaintiffs' claim is for a sum of $340,818.67, being the balance of the price of diamonds and gems sold and delivered by the plaintiffs to the defendants. There was no dispute on the amount owing, as the defendants admitted the claim. However, the defendants contended that the contracts for the sale of diamonds and gems to them were tainted with illegality and the illegality arose in this way. The plaintiffs were well aware that the diamonds and gems sold to the defendants were meant for sale in Peninsular Malaysia and that they were to be taken there without any declaration and payment of customs duty due to

the Malaysian authority. The defendants maintained that the *modus operandi* in the sale and delivery of the diamonds was "a joint illegal enterprise" and a director of the plaintiffs, Pradip Ramanlal Shah, "knew and was privy to this joint illegal enterprise". That was the only defence raised and it was submitted on behalf of the defendants that that was a triable issue. The learned Assistant Registrar, who heard the application, gave unconditional leave to the defendants to defend the action and against that decision, the appeal was brought. At the conclusion of the hearing of the appeal, I varied the decision of the learned Assistant Registrar and ordered that leave be given to the defendants to defend the action on condition that the defendants furnished a bank guarantee for the sum of $340,818.67 within 21 days from the date thereof, in default of which the plaintiffs would be at liberty to enter final judgment against the defendants for the sum claimed with interest and costs.

In seeking to set up the defence of illegality, Mohamed Yusoof s/o Mohamed Dawood, a director of the defendants, in his affidavit affirmed on November 4, 1986 said, *inter alia,* as follows:

"9. The plaintiffs were well aware that the diamonds and gems sold to the defendants were meant for sale in Peninsular Malaysia.

10. The plaintiffs were well aware that the said diamonds and gems were being taken into Peninsular Malaysia without declaration and payment of the customs dues due to the Malaysian authorities.

11. The *modus operandi* of the sale and delivery between the plaintiffs and defendants was a joint illegal enterprise. The said Pradip Ramanlal Shah knew and was privy to this joint illegal enterprise."

Mohamed Yusoof then proceeded to show how he took delivery of the diamonds and gems from the plaintiffs. He said that he went to the plaintiffs' premises, collected the diamonds and gems under consignment notes, and then brought them to Malaysia and sold them there, and that those which were unsold were returned to the plaintiffs, who would then invoice and bill the defendants only for those diamonds and gems which were sold. That was the *modus operandi* in the sale of all the diamonds comprised in the 13 invoices set out in paragraph 1 of the statement of claim, except for five lots of diamonds, in respect of which, he said this:

"21. As suggested and advised by Pradip Ramanlal Shah these lots were exported legally from Singapore into Peninsular Malaysia in order to give an air of legality to the entire transactions. When they were so exported the packing was done in the plaintiffs' office under the supervision of Pradip Ramanlal Shah. The preparation of all the documents for the export was also done by the plaintiffs but on the defendants' invoices. This was done by the plaintiffs' clerk named Nadirah."

He then said that the plaintiffs were fully aware of the entire transaction and that the diamonds and gems were smuggled into Peninsular Malaysia for sale there.

An examination of the allegations contained in the affidavit does not really show that there was "a joint illegal enterprise" and that the plaintiffs were "privy to this joint illegal enterprise". The defendants admitted there were sales of diamonds and gems to them and that the sales were on consignment: the plaintiffs billed for only those items sold by the defendants. The sales and delivery took place in Singapore. They were exported by the defendants to Malaysia for sale by them, and in taking them across to Malaysia the defendants committed the illegal acts under the laws there: they smuggled the diamonds and gems into Malaysia without payment of customs duty. There was no suggestion that the plaintiffs' servants or agents in any way took part in the smuggling or assisted in the smuggling. The plaintiffs might be well aware of such illegal acts of the defendants, their servants or agents. But mere knowledge on the part of the plaintiffs that the diamonds and gems sold to the defendants would be exported illegally by the defendants to Malaysia does not constitute a defence to the claim by the plaintiffs. In the case of *Fielding & Platt Ltd.* v. *Selim Najjar,*[1] an English manufacturer sold to a Lebanese company an aluminium extrusion press which was delivered at a British port. The defendant, on an application under Order 14, claimed that it was an express term of the contract that the goods would be invoiced as "parts for a rolling mill", and the purpose, as the plaintiffs well knew, was to cause a false invoice to be put up so as to enable the press extrusion plant to be imported to Lebanon contrary to Lebanese law. The defendant therefore claimed that the contract was tainted with illegality. This defence was dismissed on an application under Order 14 and leave to defend on this point was refused. The refusal on this ground was confirmed on appeal by the Court of Appeal. Lord Denning said that in order for such a defence to succeed, the defendant must show two things: he must show, firstly, that the contract contained a term that the English manufacturers were to give a false invoice, and, secondly, that the English company were implicated in illegality in that they

had knowledge of it and actively participated in it. He said, at p. 362:

"In the second place, even if it were a term, the defendant would have to show that the English company were implicated in this illegality, that is, that they had knowledge of it and were actively participating in it: see *Foster* v. *Driscoll* [1929] 1 K.B. 470, 518, by Sankey L.J."

The passage of the judgment of Sankey L.J. in *Foster* v. *Driscoll*[2] referred to by Lord Denning, is as follows:

"... In my view the present position of the law is that the mere fact that a vendor of goods knows that the purchaser proposes to run them into a country where they are prohibited by some revenue law is not sufficient to render the contract of sale illegal, but if beyond mere knowledge the vendor actively engages in an adventure to get the goods into such country, the Court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract."

In the circumstances, having examined the allegations made by Mohamed Yusoof s/o Mohamed Dawood in his affidavits, there was really little or no substance in the suggested defence. The allegations by him of the "joint illegal enterprise" and of the plaintiffs being "privy to this joint illegal enterprise" were merely bald statements without any facts or evidence to support them. This is almost one of those cases where summary judgment should be ordered. However, in order not to shut the defendants out from such defence, I gave to the defendants conditional leave to defend.

As regards the condition I imposed, I do not think it is unfair or unreasonable to the defendants. They are still carrying on a diamond business and they or their directors should be able to arrange for a bank guarantee. There was no evidence that they could not do so. They had taken the diamonds and gems from the plaintiffs and had sold them, and had the benefit of such sales.

Order accordingly.

Solicitors: *Richard Ang & Co.; Kala Mohan & Peter.*

A BRUNEI REPORT

PUBLIC PROSECUTOR v. FRANCIS DANG ANAK NUYA

[O.Cr.J. (Macdougall J.) May 20, 1987]

[Bandar Seri Begawan – Criminal Trial No. 6 of 1987]

Criminal Procedure – Murder – Plea to lesser offence of culpable homicide not amounting to murder – Whether murder charge needs to be amended – Sentence – Whether s.304 of Penal Code (Cap. 22) imposes a mandatory sentence of life imprisonment – Criminal Procedure Code, ss. 158 & 170.

Criminal Law – Penal Code (Cap. 22), s. 304 – Whether section imposes a mandatory sentence of life imprisonment.

In this case, the accused who was originally charged with murder subsequently decided to plead guilty to the lesser offence of culpable homicide not amounting to murder. The two issues before the court were: (1) whether the prosecution needs to amend the murder charge to one involving the lesser offence; (2) whether the first limb of section 304 of the Penal Code (Cap. 22) imposes a mandatory sentence of life imprisonment.

Held: (1) in a case such as the present one the correct procedure is for the charge of murder to be read to the accused for plea. If he wishes to plead guilty to the lesser offence, it is open to him to plead not guilty to murder but guilty to culpable homicide not amounting to murder. The agreed facts should then be read to the accused. If he confirms that they are correct, it is then open to the prosecution to state whether it accepts that plea;

(2) if the practice has been to substitute a charge of culpable homicide not amounting to murder for one of murder where the prosecution is prepared to accept a plea from the accused to the lesser offence, then it is wrong and should cease;

(3) section 304 imposes a mandatory sentence of life imprisonment.

Case referred to:

(1) *Public Prosecutor* v. *Lee Ah Sam* [1949] M.L.J. 236.

CRIMINAL TRIAL.

Ivan Leong (Deputy Public Prosecutor) for the Public Prosecutor.

Daljit S. Sandhu for the accused.

Cur. Adv. Vult.

Macdougall J.: At the beginning of this trial, the Deputy Public Prosecutor, Mr. Ivan Leong, having indicated that the accused intended to plead guilty to the lesser offence of culpable homicide not amounting to murder, sought my guidance as